

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 15, 2008 Session

**DOYLE GLENN SCOGGINS, JR., v. STEPHANIE LEIGH SCOGGINS
(now HOWARD), RE: JONATHAN TYLER SCOGGINS, DOB 7/9/93**

**Direct Appeal from the Chancery Court for Giles County
No. 1797 Hon. Robert L. Jones, Judge**

No. M2007-02148-COA-R3-CV - Filed July 2, 2008

Post divorce, the father moved for a change of custody of the parties' eldest child and upon trial, the Trial Court found a change of circumstances and ordered a change in custody of the child to the father from the mother. On appeal, we reverse on the grounds that the evidence preponderates against the Trial Court's finding that it is in the child's best interest to change custody to the father.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Joe W. Henry, Jr., Pulaski, Tennessee, for Appellant.

Robert D. Massey, Pulaski, Tennessee, for Appellee.

OPINION

Petitioner, Doyle Glenn Scoggins, Jr., ("father") petitioned the Court for Change in Custody on November 1, 2006, asserting that custody of the parties' oldest child, Jonathan Tyler Scoggins, d.o.b. 7/9/93, should be changed to him from the mother. The respondent, Stephanie Leigh Scoggins ("mother"), answered, and denied that grounds existed to change custody.

The Court conducted a trial on August 29, 2007.

Tim Keenum was the first witness, and he testified that he was pastor at Sardis Springs Baptist Church in Ardmore, Alabama, that the father started dating his wife Kim about two years ago and came to church with her. He stated he counseled the father and Kim before their wedding, and also did family counseling with the children, and that the father and Kim attended church and Sunday School regularly with the children.

Keenum testified that the youngest child did mention during a counseling session that his mother was marrying a black man.

Kim Scoggins testified that she and the father married in June 2006, and she was a third grade teacher, and that she had two daughters from a previous relationship, ages 15 and 10, and that the father's boys were with them every other weekend.

Kim testified that Tyler had very strong ties with his father, and that all the kids got along well together, and that they would be able to provide for Tyler's needs if he lived with them. Kim also testified that she knew the mother's interracial relationship had bothered Tyler, because he had talked to her about it, and that Tyler had expressed a desire to live with them because of it.

Shirley Dilworth was the next witness, and she testified that she was Kim's mother, and that the father seemed to have a very loving relationship with the boys, and stated that the boys got along well with Kim and her daughters. The father's stepmother also testified to an excellent relationship between the father and Tyler.

The father then testified that he was 40 years old, and he worked for Cell-Pak installing cabinets, and that after the divorce in 2001 he moved to Alabama shortly thereafter. He admitted that he could have done better at being involved with Tyler's education, and would do better if Tyler lived with him. He testified that he had never undermined Tyler's relationship with his mother, but admitted that he and the mother did not communicate well. He testified that he had never exercised the Thursday night visitation that was provided for in the parenting plan, because of his work schedule. He testified that the boys were not as happy since their mother remarried, and he felt Tyler had problems with his friends due to the mother's interracial relationship. He testified that he thought the mother was a good mother, but that Tyler had expressed the desire to live with him. He admitted that he had lived with three or four different women since the divorce, and that he had also married and divorced another woman prior to marrying Kim. He conceded that he had never taken an interest in the boys schools and teachers, and that he did not learn of Tyler's school performance until the end of last year.

The father testified that he could not recall referring to Mr. Stanley Howard (the mother's husband) using the "n" word.

Tyler testified outside the presence of the parties, and stated that he was 14 years old, and in the 8th grade. Further that his mom started dating his stepdad when he was in 3rd grade, and testified he didn't interact with his stepdad much because his stepdad worked in the evenings. Tyler

testified that his stepdad coached his basketball team last year. He testified that his stepdad had once told his younger brother Bailey to go to his room and not turn on the light as punishment, because Bailey was scared of the dark. He stated that his stepdad told Bailey if he turned on the light, he would whip him, and stated that his stepdad had a big paddle, and he broke it last year using it on his daughter, and got a new, bigger one, but had not used it on anyone. Tyler testified that his stepdad had a 12 year old daughter who lived with them, and he acknowledged that he told his father he wanted to live with him because of his stepdad, and had also told his mother. He testified that if it weren't for his stepdad, he would probably still want to live with his dad because there was more to do there, his dad has a pool, a trampoline, and a basketball goal.

Tyler testified that he had made bad grades, and that his worst were English and math, and acknowledged that this occurred because he didn't do his homework. He testified that his mother had tried to help him with his school work, and had helped him with homework, etc. Tyler testified that his father had used the "n" word when talking to him about Mr. Howard, and that his father had advised him that he would whip Mr. Howard, but was afraid he would go to jail. Tyler admitted that Mr. Howard had never said anything bad about his father.

Donna Bain testified that she was a Title I (special needs) reading teacher, and that she taught Tyler in the 3rd - 5th grades. She testified that she had a good relationship with Tyler, that she had never met the father, and that the mother came to all of the parent/teacher conferences, and was supportive and caring, and obviously worked with Tyler at home.

Debbie Hardaway was the next witness, and she testified that she was the Title I math teacher, and she had worked with Tyler in the 6th and 7th grades, and was now working with him in 8th. She testified that she had a very good relationship with Tyler, and that she had had conferences with the mother, and that she was very open and interested. Further, that Tyler was respectful and well-mannered, and did not have an absentee problem. Likewise, she had never met the father.

The mother then took the stand, and testified that she worked for a psychiatrist as an office manager, and worked on Monday, Wednesday, and Friday, and that she had worked there for six years. She testified that she had married Mr. Howard in April 2006, and that Howard had custody of his daughter and they lived in a house with all four children. She testified that they were currently adding on 712 square feet to their home, and offered pictures.

The mother testified that she had a good, loving relationship with Tyler, and she had always participated in Tyler's education, and had sought help for him because he was struggling, as well as working with him at home. She testified that the father never participated in school matters, and that she sent him copies of report cards, so he knew Tyler was struggling. The mother testified she took Tyler to a tutor, because he had trouble with basic reading skills.

The mother testified that the boys had a good relationship with their stepdad, but that Tyler was the most distant, since he was older when she and the father divorced. The mother testified the father's family started making derogatory comments to her as soon as they knew about

Mr. Howard. The mother admitted that Tyler had told her that he wanted to live with his father, but stated that she objected to that because she felt the father had influenced Tyler's preference. She testified the father had not had a steady relationship in the six years since their divorce, and had not participated in Tyler's education nor extra-curricular activities, and that it would cause stress between Tyler and his brothers. She testified that Tyler seemed happy in their home, and secure, but he would display a change in attitude after talking on the phone with his father. She further testified that the father threatened to choke her after he found out she was dating Mr. Howard.

The mother testified that she wrote the father a letter about wanting Tyler to go to Sylvan Learning Center, but the father never responded. She did not take Tyler to Sylvan but found out about the Wilson reading program and decided to get him help there instead. The mother admitted that her husband had paddled the children, but stated that he did not have to anymore, that they usually just disciplined with a verbal warning.

She testified that Tyler's grades had improved this year and he was working harder, because of basketball, and that she continued to work with him, and that Tyler had a job at Boys and Girls Club last summer.

Nick Whetsel was the next witness, and he testified that he had coached Tyler's baseball team when he was ten, and also coached his basketball team in sixth grade. He testified that Tyler was always at the practices/games, and that he appeared to be a happy child, and that the mother always came to practices and games, and was committed. Whetsel testified that he knew the stepfather, because he always came to the games and practices as well, and would help out if needed. He thought there was a good relationship between Howard and Tyler.

Mr. Howard was the next witness, and he testified that he worked as a supervisor at Internet, and went to work at 2:00 p.m. and got off at midnight. He testified that he tried to be very involved in their sons' activities, that he played football with the boys, that he helped coach Tyler's basketball team, and that he did not think the boys had a problem with him, but felt that they knew their father did, and that it was a racial issue. Further, that the father would call and make threatening comments to him. Howard testified that he cared about all three boys and did discipline the boys when necessary.

Following trial, the Court entered an Order finding that a material change of circumstances had taken place, and that it was in the best interests of Tyler to change custody from the mother to the father. The Court in its Memorandum Opinion found the child had not done well in school, and that this could be a change of circumstances. The Court found the stepfather's race was not a factor, and that the stepmother was a teacher and could help with the educational issues, so that could be a change of circumstances. The Court found the child had stated a preference to live with his father, and considering all of these circumstances, a substantial and material change had occurred, and that the child's best interests would be served by changing his home environment.

On appeal, these issues are before the Court:

1. Whether the Trial Court abused its discretion by misapplying Tennessee law with regard to modifications of child custody decrees?
2. Whether the Trial Court erred in finding a material change of circumstance as it relates to the minor child?
3. Whether the Trial Court erred in determining that the best interest of the minor child is served by naming the father the primary residential parent?

The mother argues that the Trial Court erred in finding that a material change of circumstances had occurred. As this Court has previously explained:

In child custody cases, the law is well established that when a decree awarding custody of children has been entered, that decree is *res judicata* and is conclusive in a subsequent application to change custody, unless some new fact has occurred, which has altered the circumstances in a material way, so that the welfare of the child requires a change of custody. In short, once the trial court has made an initial determination with respect to custody, it cannot entertain a subsequent petition to modify custody absent a material change in circumstances, such that the welfare of the child demands a redetermination. A "material change in circumstances" justifying modification of a child custody order may include factors arising after the initial determination or changed conditions that could not be anticipated at the time of the original order. If the trial court finds that there has been a material change in circumstances, it will then consider the petition to modify custody using a "best interest" standard. As this Court has previously recognized, there is a strong presumption in favor of the existing custody arrangement. The party seeking to change the existing custody arrangement has the burden of proof to show both that the child's circumstances have materially changed in a way that was not reasonably foreseeable at the time of the original custody decision, and that changing the existing custody arrangement will serve the child's best interests. Under this standard, the primary inquiry is whether there has been a material change in the child's circumstances.

Although there is no concrete definition for what constitutes a material change of circumstances, this Court has enumerated several factors that should be taken into consideration when determining whether such a change has occurred. In general, the change must occur after the entry of the order sought to be modified, and the change cannot be one that was known or reasonably anticipated when the order was entered. In addition, the material change in circumstances must be a change in the child's circumstances, not the circumstances of either or both of the parents. Finally, the change must affect the child's well-being in a material way.

Agee v. Agee, 2008 WL 2065996 (Tenn. Ct. App. May 16, 2008)(citations omitted).

In this case, the Court found that the child had not done well in school, and that this might be a change of circumstances. The Court also found that the stepmother was a teacher and could help with the educational issues, so that might be a change of circumstances, and the Court found that the child had stated a preference to live with his father, and that all of these circumstances constituted a material change.

Tyler's academic struggles would constitute a change that has occurred since entry of the original custody order, and signals a change in his circumstances that affects his well-being in a material way. *See Agee, supra*. This Court has also previously recognized that a child's preference to live with the other parent, standing alone, does not constitute a material change of circumstances, but coupled with other circumstances, may amount to a change, which is what the Trial Court found here. *See Conner v. Conner*, 2008 WL 2219255 (Tenn. Ct. App. May 29, 2008).

Having found a material change of circumstances, the Trial Court next proceeded with a best interest analysis to determine who would be the proper custodian for Tyler. It should be noted that a finding that a material change of circumstances has occurred does not predetermine the outcome of the best interest analysis and does not require that a change in custody or visitation be made, the two issues must be decided independently. *See Boyer v. Heimermann*, 2007 WL 969408 (Tenn. Ct. App. Mar. 30, 2007).

The factors which the court is to consider in determining the child's best interest are set forth in Tenn. Code Ann. § 36-6-106 and include the following:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;....
- (4) The stability of the family unit of the parents;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;
- (7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;....

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

(10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

While the Court appeared to consider some of the above factors in performing a best interest analysis, it did not discuss these factors nor make specific findings regarding them. It is therefore difficult to determine whether a proper analysis was performed. Looking at each of the factors in turn, it would appear that both parents had strong emotional ties with Tyler, that both were able to provide for his needs, and that both had stable home environments, although the mother's had been stable for longer than the father's. Tyler had lived with the mother since the parties' divorce, and thus continuity of placement militates in her favor.

Both parents appeared to be physically and mentally fit. Regarding Tyler's school record, he was struggling in school, and this seemed to greatly concern the Trial Court. The mother had, however, been very involved in Tyler's education and had tried her best to get him the help he needed to succeed, in that he had never been held back and was keeping up his grades sufficiently at the time of trial to maintain his placement on the school basketball team. The father, on the other hand, had not participated at all in Tyler's educational endeavors, and had never attended a parent/teacher conference, had never corresponded with Tyler's teachers in any fashion, had not sought extra help for him when he was struggling, and, in fact, was not sure he ever went to Tyler's school.

Tyler did, of course, express a preference to live with his father, and that influenced the Court's decision. As this Court has previously explained, however:

We have stated on numerous occasions that a child's preference is only one of many factors to be given consideration in a custody determination. While a child's preference can be considered, it is not controlling on the court. This Court has also held that it was error for a trial court to base its custody determination solely on the minor child's testimony regarding preference.

In re NRG, 2007 WL 1159475 (Tenn. Ct. App. April 19, 2007).

While there was some attempt by Tyler to impugn the character of Mr. Howard relating to his discipline of the children, Tyler admitted that his father had also spanked the children in the past. The Trial Court focused on the addition of the father's new wife and the fact that she

was a teacher, but did not mention Mr. Howard's involvement in the children's extracurricular activities, including his presence at most or all games and practices and the time spent coaching teams, etc. While the Court found that race was not a factor in the case, he did not acknowledge the testimony regarding the father and his family's attitude toward the mother and her husband based on race. Tyler admitted that his father had used the "n" word when referring to Howard, and such behavior was not taken into account by the Trial Court, which factor would indicate a potential poisoning of the child's mind toward his stepfather based on race.

Most importantly, the Trial Court did not mention the factor regarding each parent's past and potential for future performance of parenting responsibilities, and this factor would clearly militate in favor of custody remaining with the mother. The mother had been the primary caregiver for these children for their entire lives, and had been directly and persistently involved in not only their education, but all of their extracurricular activities as well. The mother was shown to be the parent who had attended not most, but every parent/teacher conference that had occurred, and the father had attended none. The mother had attended open houses and other school functions, and the father had attended none. The mother had been in constant contact with Tyler's teachers, had helped him at home, obtained a tutor, and done what she could to ensure his academic success, while the father had done nothing, and had never expressed concern about his son's academic struggles. The father admitted his lack of past involvement, but opined that things would be different if Tyler lived with him. The father's lack of interest in his children to date is a fact to be taken into account when deciding what is in the child's best interest.

Another factor is the impact of changing custody of Tyler to the father while leaving the other two minor children with the mother. As this Court has recognized:

Tennessee courts have consistently emphasized the importance of raising siblings in the same household following divorce, "It is generally not a good idea to separate minor children by a custody order.... Generally speaking, siblings, following a divorce, have a right to spend their minority together in the absence of proof of potential harm to one of them or other extenuating circumstances."

Grover v. Grover, 1999 WL 257653 (April 30, 1999)(citations omitted).

The Trial Court based its decision largely on Tyler's stated preference and the hope that things "might" improve because his new stepmother was a teacher. This does not satisfy the best interest analysis required by the statute, and is not sufficient to overcome the strong presumption that exists in favor of the existing custody arrangement. *See Agee*. When the proper weight is afforded to the factors regarding continuity of placement, including the impact of separating siblings and each parent's past performance of parenting responsibilities, the evidence, when considered in totality, supports our determination that Tyler should have remained in the custody of his mother.

Accordingly, we reverse the Judgment of the Trial Court's grant of primary custody

to the father, and remand, with the cost of the appeal assessed to Doyle Glenn Scoggins, Jr.

HERSCHEL PICKENS FRANKS, P.J.